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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MID-CENTURY INSURANCE COMPANY,

Plaintiff and Respondent,

v.

TANNAZ MAZAREI,

Defendant and Appellant.

G056643

(Super. Ct. No. 30-2017-00914559)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, David R. Chaffee, Judge. Reversed and remanded with directions.

John L. Dodd & Associates, John L. Dodd and Benjamin Ekenes, for Defendant and Appellant.

Mokri Vanis & Jones and Limor Lehavi for Plaintiff and Respondent.

INTRODUCTION

Tannaz Mazarei, an attorney, appeals from an order awarding sanctions to respondent Mid-Century Insurance Company and its counsel after Mazarei failed to turn up for a trial, leaving her clients, Abraham Mourshaki and Exir Co., Inc., stranded. The trial court issued an order to show cause (OSC) re sanctions and, after a hearing, awarded Mid-Century and its counsel sanctions in the amount of $6,400.

We reverse and remand on very narrow grounds. Code of Civil Procedure section 128.5 requires an order imposing sanctions to be in writing and to "recite in detail" the actions justifying the award.[1] The order in this case did not fulfill this requirement. We therefore send it back to the trial court to enter a detailed written order, which may, in the court's discretion, revisit the amount of the award. As we have already derived support for findings of bad faith from the record, this finding now becomes law of the case.

FACTS

This matter began life as a declaratory relief action by Mid-Century to recover the amounts paid to defend Mourshaki and Exir under a reservation of rights.[2] The trial court granted Mid-Century's summary adjudication motion on the duty to defend, so the only issue remaining for trial was the amount necessary to reimburse Mid-Century for the amount it had expended on Mourshaki's and Exir's defense.

A court trial was originally set for February 3, 2018. Trial was continued to February 5,[3] then to February 7, then to March 12, then to April 23, then to June 25.

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1 All further statutory references are to the Code of Civil Procedure.

2 An action for declaratory relief is entitled to priority under section 1062.3, subdivision (a).

3 Mourshaki applied ex parte in November 2017 to move the trial date from February 5 to August of 2018. The court denied the application.

On June 22, 2018, the Friday before the latest (Monday) trial date, Mazarei applied ex parte to continue the trial to August 27. The grounds were that Mourshaki was suffering from internal bleeding owing to "chronic esophagus and stomach issues." No medical evidence accompanied the application. The court denied the application to continue the trial.

On June 25, Mid-Century's counsel showed up, ready for trial. Mourshaki showed up. Mazarei did not. In fact, no one showed up to represent Mourshaki or Exir at all. Mourshaki informed the court that Mazarei had left for a seven-day trip to Europe with her family. Mid-Century's counsel stated she had not been informed of Mazarei's trip; the basis for the prior week's ex parte application to continue the trial was Mourshaki's health, which had been represented in an email to Mid-Century's counsel as "critical."

Because Mourshaki could not proceed without counsel, the court continued the trial to July 23 and set an OSC re sanctions against Mazarei for the same date for her failure to appear at trial. The court issued a minute order for the OSC on June 25 and ordered the clerk to give notice.

Mid-Century's counsel and Mazarei both filed declarations relating to the OSC. The Mid-Century declaration included a minute order from another case showing that Mourshaki was present in court on June 21 (the Thursday before the Monday trial date), when he was supposedly suffering from critical internal bleeding and in no condition to attend trial the following Monday.

In her declaration, Mazarei explained that after Mid-Century's counsel had turned down her request for another continuance, she arranged for another lawyer to take over the trial for her. Since the trial was only a couple of days away, the other lawyer offered to meet with Mourshaki over the weekend. Mourshaki declined and told the lawyer not to come to the trial on June 25. Mazarei left on her trip to Europe on the

morning of June 23. The other lawyer did not appear at trial on the 25th to explain what had happened.

Everyone reconvened on July 23, and Mazarei was present. The first order of business was a substitution of attorney form, relieving Mazarei and permitting Mourshaki to represent himself. The court ordered Mazarei to file the form. The court then conducted the OSC hearing.

At the conclusion of the hearing, the court imposed $6,400 in sanctions, the approximate amount Mid-Century had requested, on Mazarei, stating, "In the absence of an attorney substituting in before you left on this trip, it was your obligation to either get a continuance by an ex parte application or stipulation or to be here. Period." Mazarei then departed to file the substitution of attorney form.

Mid-Century then put on its evidence of the amounts spent in the defense of Mourshaki and Exir. Mourshaki declined to participate in the trial, and the court found in favor of Mid-Century, awarding it a total of $586,733.

The minute order of July 23 regarding sanctions states, "Having fully considered the arguments of all parties, both written and oral, as well as the evidence presented and for the reasons set forth in the record, the Court order sanctions against Ms. Tannaz 'Tawny' Mazarei in the sum of $6,400 and payable to plaintiff Mid-Century . . . and counsel of record."

DISCUSSION

The sanction order is appealable pursuant to section 904.1, subdivision (12). We review an order imposing sanctions under section 128.5 for abuse of discretion. "We do not independently determine whether appellant's conduct was frivolous or in bad faith, and we may not substitute our judgment for the judgment of the court below. [Citation.]" (*Sabek, Inc. v. Engelhard Corp.* (1998) 65 Cal.App.4th 992, 1001.)

Section 128.5, subdivision (a), provides in pertinent part, "A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including

attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay." Subdivision (c) requires notice and an opportunity to be heard before sanctions can be imposed on the court's own motion, and the subdivision also requires an order imposing sanctions to be in writing and to "recite in detail the action or tactic or circumstances justifying the order." Subdivision (f)(2) provides in part, "An order for sanctions pursuant to this section shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated."

On appeal, Mazarei argues that reversal is required because (1) the court failed to state it was awarding sanctions under section 128.5; (2) the court failed to provide a written order reciting in detail the actions justifying the order; (3) the court failed to make a finding of bad faith; (4) section 128.5 was the sole potential statutory basis for sanctions, and (5) the award denied Mazarei due process of law. Mazarei does not appear to have noticed that issues one and four cancel each other out. If section 128.5 was the sole potential statutory basis for sanctions, then Mazarei must have known that sanctions were being awarded under section 128.5. Likewise the "due process of law" argument is based on the purported failure to mention section 128.5 somewhere in the proceedings, which Mazarei has conceded was the only possible statutory authority for sanctions.

As to the failure to find bad faith, the court's explanation of the reasons for its decision on the record amply support a finding of bad faith. Mazarei planned a trip to Europe that conflicted with the trial date. Instead of forthrightly acknowledging the conflict, she tried to get a continuance based on Mourshaki's supposedly critical health condition, a condition convincingly demonstrated to be fictional. This subterfuge alone supports a finding of bad faith. In addition, the court found the circumstances of the ex parte application itself blameworthy, accompanied as it was by failure to give proper notice to opposing counsel and by an improper ex parte communication with the court in

the form of a package of documents delivered to the court with no notice to opposing counsel. As the court stated, "[T]here is no legitimate or ethical reason why these papers should have been submitted to the court."

But Mazarei is correct that a sanctions order must be a written one and the order must recite in detail the actions justifying the order. As the court stated in *West Coast Development v. Reed* (1992) 2 Cal.App.4th 693 (*West Coast*), "Where sanctions are imposed directly by the court, without benefit of motion from opposing counsel [citation], we can understand that the grounds for same might in some cases be obscure, absent a recitation in the order. Where, as here, sanctions follow a detailed motion by opposing counsel, fully argued and considered in an open hearing, it appears that the due process reasons for a written statement of grounds will have been satisfied, and the omission of the statement should be subject to harmless error doctrine. Further, where, as here, the appellate court has combed the record to determine on its own whether a sound basis exists for imposition of sanctions, the justification of the rule in terms of assisting the appellate court in its review seems undermined. The appellate decision itself now constitutes an exhaustive statement of reasons justifying the sanctions, and therefore sending the matter back to the trial court for another hearing is unproductive. [¶] However, all authority militates against use of the harmless error doctrine in review of an order which fails to set forth 'in detail the conduct or circumstances justifying sanctions.' [Citations.] Here the written order is devoid of any statement of its grounds. Even were we to find the oral statement sufficient in detail (which it probably is not) we would be unable to sustain the judgment. [Citations.]" (*Id.* at p. 705.)

West Coast supplies the solution: "We therefore adhere to what seems to be a well-established rule and remand the case for the fashioning of a proper order by the trial court, even though were we free to do so we would classify this error as harmless and not warranting reversal. [Citation.]" (*West Coast, supra,* 2 Cal.App.4th at p. 706). The case supplies a helpful gloss on the fate of the order on remand: "In a circumstance

such as this, remand might appear particularly useless. Having reviewed the facts in detail and found them sufficient to sustain a finding of bad faith harassing tactics under section 128.5, this court has established a principle of law which becomes 'law of the case.' [Citation.] Requiring the trial court judge now to set forth in his judgment that which we have already established makes little sense. However, we must note that we have now reviewed and detailed at some length the grounds upon which the trial court is warranted in ordering sanctions. The sanctions actually to be ordered remain a matter of discretion for the trial court. In light of our illumination of the grounds for sanction, and the fact that our reversal removes in its entirety the prior $ 5,000 order, the trial court may now impose either greater or lesser sanctions than it originally selected." (*Id.* at p. 706, fn. 6.)

DISPOSITION

Because the trial court failed to state in its order the grounds for sanctions, the case is reversed and remanded. The trial court is to review the matter in light of this opinion and to issue a new judgment awarding such sanctions as the judge may now find proper, and including appropriate findings of bad faith, or, in the alternative, denying an award. Each party shall bear its or her own costs.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.